CARL DRESSELHAUS ET AL.

IBLA 91-436 Decided November 16, 1993

Appeal from a decision of the California State Office, Bureau of Land Management, declaring mining claims abandoned and void (CAMC 125839, CAMC 125844, CAMC 125845, and CAMC 125847).

Reversed.

1. Estoppel--Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold--National Park Service

   The Board will apply the doctrine of estoppel in reversing a 1991 decision of BLM declaring mining claims situated in the Death Valley National Monument abandoned and void for failure to file a notice of intent to hold the claims in 1979, where confusion existed regarding recordation and filing requirements under the Mining
   in the Parks Act and the Federal Land Policy and Management Act and the claimants inquired of BLM in 1979 whether they were required to make additional filings for their claims during 1979, and in response BLM not only provided inaccurate information about the proper place of filing but also concealed a material fact from claimants.

APPEARANCES: M. William Tilden, Esq., San Bernardino, California, for the Roy C. Troeger Trust; Carl Dresselhaus, Los Angeles, California, pro se.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Carl Dresselhaus and the Roy C. Troeger Trust have appealed from a decision of the California State Office, Bureau of Land Management (BLM), dated July 16, 1991, declaring the Del Norte, the Del Norte No. 5, the Del Norte Fraction, and the Inyo No. 1 unpatented mining claims (CAMC 125839, CAMC 125844, CAMC 125845, and CAMC 125847, respectively) abandoned and void for failure to file a notice of intention to hold the claims during the 1979 filing period. 1/

1/ The notice of appeal filed by M. William Tilden, Esq., stated that he represented the Roy C. Troeger Trust, which owned 75-percent interest in

These claims were located within the boundaries of the Death Valley National Monument several decades prior to closure of the monument to mining on September 28, 1976, by the Mining in the Parks Act of 1976 (MPA), P.L. 94-429, codified at 16 U.S.C. §§ 1902-1912 (1988). These claims are four of 31 contiguous lode mining claims which, along with two mill site claims, were the subject of contest complaint CA-4992, issued by BLM on April 21, 1978, in response to a request from the National Park Service (NPS). 2/ The complaint charged that the lode mining claims were invalid for lack of discovery and that the mill sites were invalid for lack of proper use.

Administrative Law Judge L. K. Luoma conducted an extended hearing on the complaint on June 5-7, 1979, in Las Vegas, Nevada and on October 30 through November 4, 1979, in Reno, Nevada. In his September 23, 1981, decision, Judge Luoma found that the Government had established a prima facie case based on Government witnesses' testimony that their examination of the claims failed to disclose valuable deposits of gold and silver that could be extracted and mined at a profit using conventional mining and milling processes (Decision at 12). However, he found that the contestees had established that "there is a massive and continuous lode or quartz vein extending over some of the Del Norte group of claims," including the Del Norte No. 5, the Del Norte Fraction, and the Inyo No. 1 claims, and that they had established by a preponderance of the evidence that heap leaching the gold on those claims would be profitable. He ruled that they had failed to carry their burden as to the remaining claims, including the Del Norte claim (Decision at 13).

In United States v. Dresselhaus, 81 IBLA 252, 259, 267 (1984), this Board affirmed Judge Luoma's decision with respect to the Del Norte Fraction, Del Norte No. 5, and Inyo No. 1 claims, but reversed his decision as to the Del Norte claim. Thus, each of the four claims declared abandoned and void by BLM in its July 16, 1991, decision was determined by the Board in 1984 to contain the discovery of a valuable mineral deposit. 3/

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fn. 1 (continued)
the mining claims at issue. Carl Dresselhaus, who stated that he owns 25 percent of the claims, filed a separate appeal. In Tilden's statement of reasons, however, he stated that he was attorney for the "Defendants," which he listed as Carl Dresselhaus, Virginia Troeger, Bell Mountain Silver Mines, Inc., and Coso Corporation. Bell Mountain Silver Mines, Inc., and Coso Corporation are identified in the record as, at one time, lessees of the claims. Dresselhaus filed a separate statement of reasons.

2/ The claims are known collectively as the Del Norte Group (Del Norte Nos. 1 through 5, Del Norte Fraction, Inyo Lode and Inyo Nos. 1 through 3 lode mining claims, and the Del Norte Millsite), and the Skidoo group (Silver Ball, Silver Ball Nos. 1 through 11, Gold Rock, and Gold Rock Nos. 1 through 7 lode mining claims, and the Gold Bottom millsite).

3/ Although the Government presented the issue of abandonment of the claims in briefing before Judge Luoma asserting that appellants had failed to file notices of intention to hold the claims in 1978 and 1979, Judge Luoma did

The issue to be decided in this appeal is whether BLM properly declared the four claims abandoned and void for failure to file a notice of intent
to hold the claims for the 1979 filing year. We will begin by reviewing section 8 of the MPA, 16 U.S.C. § 1907 (1988), section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1988),
and the implementing regulations.

Section 8 of the MPA, 16 U.S.C. § 1907 (1988), established the following recordation requirement with regard to mining claims located within the National Park System:

> All mining claims under the Mining Law of 1872, as amended and supplemented, which lie within the boundaries of the National Park System shall be recorded with the Secretary of the Interior within one year after September 28, 1976. Any mining claim not so recorded shall be conclusively presumed to be abandoned and shall be void. Such recordation will not render valid any claim which was not valid on September 28, 1976, or which becomes invalid thereafter. Within thirty days following September 28, 1976, the Secretary shall publish notice of the requirement for such recordation in the Federal Register. He shall also publish similar notices in newspapers of general circulation in the areas adjacent to those units of the National Park System listed in section 3 of this Act.

Pursuant to this statutory directive, on October 20, 1976, NPS published a notice in the Federal Register apprising claimants of their obligation to record their claims. Under this notice, claimants were directed to record their claims with the "Superintendent of the Unit in which they are located on or before September 26, 1977." 41 FR 46357 (Oct. 20, 1976).

On November 11, 1976, NPS published interim regulations and proposed comprehensive regulations to implement the MPA. 41 FR 49862. The interim regulations did not address recording requirements, but the proposed comprehensive regulations outlined the recordation requirements as set forth in the Federal Register notice of October 20, 1976. The proposed comprehensive regulations also included the MPA's requirements of a 4-year moratorium on surface disturbance in various units of the National Park System, including Death Valley National Monument, as well as a waiver of the annual assessment work requirement imposed by the 1872 Mining Law, 30 U.S.C. § 28 (1988), for all claims subject to the surface disturbance moratorium. 41 FR 49864-65 (Nov. 11, 1976); see sections 4 and 5 of the MPA. Thus, under the proposed implementation of the MPA, claimants in Death Valley National Monument were required to record their claims with the Superintendent of that Unit, and
no assessment work was required during the four-year moratorium. Neither

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fn. 3 (continued)
not address that issue in his decision. On appeal to this Board, the Government, in response to the appeal filed by contestee, made no mention of a failure to file notices of intent.

the MPA nor the proposed regulations included any requirement for filing a notice of intention to hold an unpatented mining claim in the Death Valley National Monument during the moratorium.

FLPMA was signed into law on October 21, 1976, just prior to publication of the MPA proposed rules. Section 314(b) requires owners of claims to record their claims in the proper BLM office by filing a copy of the notice of location. For claims located prior to the enactment of FLPMA, the claims had to be "recorded" by October 22, 1979. Section 314(a) provided that for any claim located prior to the date of FLPMA, the claimant had to file within 3 years of the date of enactment, i.e., by October 22, 1979, either a notice of intention to hold the claim or an affidavit of assessment work. Similar filings were then required prior to December 31 of each year thereafter.

BLM published proposed regulations to implement section 314 of FLPMA on December 10, 1976. 41 FR 54084. Proposed 43 CFR 3833.1 dealt with "recordation" of mining claims required by section 314(b) of FLPMA and section 8 of the MPA. For claims within the National Park System, proposed 43 CFR 3833.1-1 directed owners to comply with NPS notice published in the Federal Register on October 20, 1976, which required recordation of the claims with the Superintendent by September 26, 1977, pursuant to the MPA. Proposed 43 CFR 3833.2 dealt with the annual "filing" requirement of section 314(a) of FLPMA. The owners of all unpatented mining claims located on Federal lands on or before October 21, 1976, were directed to file the specified documents in the proper BLM office "before" October 22, 1979, and prior to December 31 of each year thereafter.

On January 26, 1977, NPS published final regulations implementing the MPA. 42 FR 4835. NPS incorporated the FLPMA requirements into its rulemaking. In attempting to deal with both FLPMA and the MPA, it stated that the section 314(b) "recordation" requirement would be satisfied by complying with the MPA section 8 "recordation" requirement, and that the "Regional Director" would forward the documents to BLM. With regard to section 314(a) "annual filings," the final regulation stated in pertinent part: "[S]ubsequent annual filings of notice must be made under section 314 and implementing regulations with the Superintendent who will provide copies to the Bureau of Land Management. These subsequent filings with the Superintendent will satisfy the requirements of section 314 for mining claims in the National Park System." 43 FR 4838; 36 CFR 9.5(d).

Thus, under NPS' final rules, claimants were directed to file under section 314(a) and "implementing regulations" with the Superintendent, rather than with BLM. Section 314(a), as noted above, required the first filing by October 22, 1979. The reference to "implementing regulations" was to the BLM regulations which were promulgated in final form on January 27, 1977 (1 day after NPS regulations were finalized) as 43 CFR Part 3830. 42 FR 5298. BLM's final regulations were different from the proposed regulations with respect to the section 314(a) annual filing requirements. Rather than require all claimants to file with BLM as

originally proposed, the final regulations referred owners of claims in the National Park System to NPS regulations for guidance, stating:

> The owner of an unpatented mining claim located within the boundaries of units of the National Park System must comply with the requirements of 36 C.F.R. 9.5(d) for "annual filing" and copies of all those annual filings received by the National Park Service pursuant to the regulation will be given by the National Park Service to the proper BLM office. Compliance with the requirements of that regulation will be deemed full compliance.

42 FR 5301 (Jan. 27, 1977); 43 CFR 3833.2-1(a)(3).

On April 5, 1979, NPS published an emergency final rule to clarify the relationship between the requirements of section 8 of the MPA and those of section 314 of FLPMA. 44 FR 20426. 4/ The rule acknowledged that the one time "recording" provision of section 8 of the MPA no longer had prospective application and that henceforth the "recording" and "filing" requirements of section 314 of FLPMA were controlling. The rule directed claimants to "record" their claims in accordance with BLM regulations and to submit their annual "filings" to the proper BLM office, rather than the Superintendent's office. The BLM office would then forward the pertinent documents to the Superintendent. BLM amended its regulations at 43 CFR 3833 to conform with NPS regulations at 36 CFR Part 9. 44 FR 20428 (Apr. 5, 1979). The adopted language for the first time specifically stated that for mining claims located within any unit of the National Park System notices of intent had to be filed before October 22, 1979, and on or before December 30 of each calendar year after the year of recording. 43 CFR 3833.2-1(b)(1). However, as noted, this explicit regulation did not appear until 1979.

This review of the series of proposed and final rules illustrates the difficulty encountered by BLM and the NPS in coordinating the filing requirements of section 314 of FLPMA with the recording requirements of section 8 of the MPA. The case file herein contains a memorandum dated April 9, 1981, from the Assistant Solicitor of Conservation and Wildlife, and the Assistant Solicitor, Onshore Minerals, to the Directors of NPS and BLM, entitled "FLPMA § 314 Filings during 1977-78 for Unpatented Mining Claims in units of the National Park System" (Memorandum). The purpose of this memorandum was to discuss a "problem" which had arisen with regard to filing requirements for claimants in the NPS. The memorandum stated that several mining claimants who had timely recorded their claims under section 8 of the MPA had failed to make a FLPMA section 314(a) annual filing in 1978, and that the Department's position was that such a failure constituted an abandonment. The memorandum continued:

> To the extent that the difficulty in implementing and coordinating the recording and filing requirements of FLPMA and MPA may have

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4/ The need for the emergency rulemaking arose out of the President's action of Dec. 1, 1978, establishing 13 new or expanded national monuments in Alaska under NPS jurisdiction.

> created some inequitable results, we felt that it was proper to review our position with respect to filing requirements for 1978. We have concluded that confusion among Departmental personnel and vagueness in the regulations in effect prior to 1979 create serious doubt as to the enforceability of our current position, and could well lead to undesirable precedent if we continue to maintain this position. We have concluded that it is within the legal authority of the Department to take an alternative position, namely that failure to file in 1978 does not constitute an abandonment under FLPMA of claims recorded in 1977 pursuant to section 8 of MPA.

(Memorandum at 1-2). Further, the memorandum describes the circumstances which gave rise to the confusion relating to filing requirements for claims in the National Park System during the 3-year period following the enactment of FLPMA:

> The confusion which apparently arose during this period and the advice allegedly given to some owners of the claims within the National Park System may well have arisen from the following combination of circumstances:
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> 1) NPS personnel were probably more familiar with the MPA than FLPMA during this period, and MPA has no annual filing requirement.
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> 2) The waiver of the annual assessment requirement under MPA may have created an initial impression that annual maintenance of a claim was unnecessary.
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> 3) FLPMA on its face does not require any Section 314(a) filings until October 21, 1979.
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> 4) The proposed regulations to implement MPA did not have any reference to annual filings (since they were drafted prior to passage of FLPMA) and the final regulations, while alluding to "subsequent annual filings required by Section 314(a) of FLPMA" did not clearly indicate that such filings had to commence in 1978 in accordance with the construction of section 314(a) found in 43 C.F.R. 3833.2-1(a)(1).

(Memorandum at 8).

The instant case demonstrates that the confusion with regard to filing requirements for claims situated in the National Park System continued beyond the 1978 filing period. 5/ By letter to the California State Office, BLM, dated September 5, 1979, appellants inquired whether they were required

5/ The record shows, and BLM does not dispute, that appellants timely recorded their claims under section 8 of MPA.

to make additional filings to protect their unpatented mining claims in the Death Valley National Monument. The text of this letter is set forth below:

> We are in a Department of Interior Contest regarding a 31 Claim Group in Inyo County, California. The Contest is still pending, and we are wondering if we are required to submit certified copies of the Notices of Location of the 31 unpatented claims. The certified copy of the Location Notice and Amendments to the Locations have already been delivered to Department of the Interior, Parks Service, Death Valley, California. It is our belief that we have sufficiently complied with this law regarding the registration of unpatented claims with the Bureau of Land Management.
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> I would appreciate hearing from you at the earliest possible time. If we are to file these certificates again, there will be a substantial cost. I believe that we might have the right to request the forwarding from the Parks Service in Death Valley in lieu of re-ordering the same Notices of Location from the Inyo County Recorder.

By letter dated September 24, 1979, the California State Office, BLM, responded to appellants' letter as follows:

> In response to your inquiry of September 5, 1979, please be advised that if your claims were properly recorded with the Superintendent of Death Valley National Monument, it is not necessary for you to record again with BLM. All required documents relating to claims within units of the National Park System must be filed with the Superintendent in accordance with 36 CFR 9.5. It is the responsibility of the Park Service to provide copies to the BLM. [Emphasis in original.]

This response is inaccurate or misleading in several respects. The purpose of appellants' letter was to determine whether they were required to file additional documents with BLM. Even though they refer specifically to notices of location for the 31 unpatented claims, they state: "It is our belief that we have sufficiently complied with this law regarding the registration of unpatented claims with the Bureau of Land Management." BLM's statement that claimants were to file all required documents relating to claims within the National Park System with the Superintendent is contrary to the emergency regulations promulgated by BLM on April 5, 1979, which provide clearly that such documents must be filed with "the proper BLM office," which will forward them to the Superintendent. 44 FR 20430 (Apr. 5, 1979). Moreover, and most critically, BLM failed to inform them that a notice of intent to hold their mining claims was required to be filed by December 30 of each year subsequent to recording their claims.

Appellants contend in their statements of reasons that estoppel is warranted in this case based on both oral and written representations. First, appellants assert that, in 1978, during the contest proceedings, their attorneys discussed with John McMunn, counsel for the Government at

that time, the subject of whether they were required to file a notice of intent to hold for 1978 and 1979, and were informed that filing the notice was not necessary for either year. 6/ Second, they claim reliance on the September 24, 1979, letter from BLM, quoted supra. BLM did not file an answer to either of the statements of reasons filed in this case.

[1] We agree with appellants that this case presents facts appropriate for application of the doctrine of estoppel. The Board has stated on a number of occasions, most recently in Leitmotif Mining Co., 124 IBLA 344 (1992), that it will look to the elements of estoppel set forth in United States v. Georgia-Pacific Co., 421 F.2d 92 (9th Cir. 1970), as the initial test in determining estoppel questions presented to the Board. United States v. White, 118 IBLA 266, 303-04, 98 I.D. 129, 149 (1991). In Ptarmigan Co., 91 IBLA 113, 117 (1986), aff'd, Bolt v. United States, 994 F.2d 603 (9th Cir. 1991), we stated:

> First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia- Pacific Co., 421 F.2d 92 (9th Cir. 1970):
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> > Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Henry E. Reeves, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982); State of Alaska, supra. Third, estoppel against the Government in matters concerning the public lands must be based on affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D.F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

Leitmotif Mining Co., supra, a case similar in many respects to the case before us, involved a decision by the Arizona State Office, BLM, rejecting for recordation notices of location for mining claims because they

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6/ In support of that contention the case record contains the affidavits of Thomas A. Illmensee and James A. Pascarella, counsel for appellants in the contest proceeding, dated June 2, 1980, and filed with Judge Luoma on June 10, 1980, recounting the substance of the discussion with McMunn.

were not filed in the proper BLM office as required by section 314(b) of FLPMA and 43 CFR 3833.1-2(a). Leitmotif located the claims on December 3, 1990, and on January 24, 1991, and, assertedly, in accordance with oral instructions from the Arizona State Office, filed the notices of location with the Nevada State Office. In a letter to Leitmotif dated January 28, 1991, the Nevada State Office explained that it was returning the certificates without taking any action on them because they had been accompanied by a post-dated check to cover the recordation fees, and that Leitmotif still had "until March 4 to resubmit [its] certificates along with a properly dated check in order for them to be timely filed."

The Board ruled that the facts in Leitmotif Mining Co., presented a "classic situation for the application of the doctrine of estoppel." 124 IBLA at 346. The Board ruled that BLM knew the true facts, i.e., the proper office for recordation of the claims, but that in its January 28, 1991, letter, BLM failed to inform Leitmotif that the Nevada State Office was not the proper BLM office for filing. The Board noted that the Nevada State Office did not at that time, when Leitmotif still had time to make a timely filing in the proper office, instruct it that the Nevada State Office was the wrong one. It did not do so until over 9 months later, when it issued the decision rejecting the notices of location for recordation. The Board found that Leitmotif was ignorant of the true facts, since the regulations governing recording of mining claims with BLM are ambiguous as to where recordation filings are to be made. The Board also ruled that BLM's January 28, 1991, letter constituted an "official decision" within the meaning of Martin Faley, 116 IBLA 398, 402 (1990), and cases cited therein.

Similarly, the facts in the instant case satisfy the elements set forth in Georgia-Pacific. BLM knew the true facts, and it can be reasonably stated that appellants were ignorant of the true facts. The facts were, as noted, that BLM published an emergency rule on April 5, 1979, explicitly stating for the first time that the owner of an unpatented claim within the NPS was required to file before October 22, 1979, and on or before December of each calendar year after the year of recording a notice of intention to hold the mining claim, and that these documents should be filed with BLM. BLM's letter to appellants, however, did not reflect those facts. It erroneously informed appellants that all documents relating to claims within the NPS were required to be filed with the Superintendent, and it failed to disclose that a notice of intent was required for 1979. Moreover, at the time appellants made their inquiry of BLM they were vigorously defending these claims and others in the contest proceeding. Thus, it is reasonable for appellants to have assumed that there was no necessity to file a notice of intention to hold in 1979, as both NPS and BLM were well aware of their claims.

As the Board noted in Leitmotif Mining Co., because estoppel against the Government in matters concerning the public lands is an extraordinary remedy, it must be based upon a demonstration of affirmative misconduct, such as misrepresentation or concealment of material facts. This Board has held that oral statements by BLM are insufficient to support a claim of estoppel. Martin Faley, supra, and cases cited therein. Accordingly, if appellants' allegations of oral representations by John McMunn that they

need not file a notice of intent to hold the claims in 1978 and 1979 were the only basis for estoppel, the record would be insufficient to support application of the doctrine. In Faley, the Board stated:

> We have expressly held that, as a precondition for invoking estoppel, "the erroneous advice upon which reliance is predicated must be 'in the form of a crucial misstatement in an official decision.'" Cyprus Western Coal Co., [103 IBLA 278 (1988)] at 284, quoting United States v. Morris, 19 IBLA 350, 377, 82 I.D. 146, 159 (1975), and cases cited therein. [Emphasis in original.]

See Marathon Oil Co., 16 IBLA 298, 316, 81 I.D. 447, 455 (1974), rev'd on other grounds, Marathon Oil Co. v. Kleppe, 556 F.2d 982 (10th Cir. 1977), quoting Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) ("Not every form
of official misinformation will be considered sufficient to estop the government," but that "in this situation where the erroneous advice was in
the form of a crucial misstatement in an official decision," estoppel could be properly applied. 427 F.2d at 56-57).

In Leitmotif Mining Co., this Board ruled that a letter from BLM to
the appellant failing to explain that the Nevada State Office, BLM, was
not the proper place for filing a notice of location constituted an "official decision." Similarly, in this case, BLM's September 24, 1979, letter constitutes an "official decision" which misled or concealed material facts from appellants. By failing to explain in its letter that appellants were required to file a notice of intent to hold the mining claims in each year following the date of recordation, BLM concealed a material fact from appellants and induced them not to file a notice of intention to hold in 1979. Such failure violates the standards of fundamental fairness.

Finally, this is not a situation where estoppel will result in appellants being granted a right not authorized by law. Rather, this is a case in which appellants would otherwise have timely filed a notice of intent to hold the claims at issue with BLM, but for BLM's concealment of a material fact. In such circumstances, and given the history of these claims, estoppel is properly invoked to prevent BLM from declaring the claims abandoned and void for failure to file a notice of intent to hold the claims in 1979.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge